No. 73-1071

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

SUPREME COURT, U. S.
FILED
JAN 8 1974
MICHAEL RODAK, JR., CLERK

LORCH-WESTWAY CORPORATION, *et al.*,
Appellants,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS–
FORT SMITH DIVISION

JURISDICTIONAL STATEMENT

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

Appellants Lorch-Westway Corporation, et al.,[1] forty-one shippers (Shippers) supporting the application and certificate of Johnson Motor Lines, Inc. (Johnson), also

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[1] Lorch-Westway Corporation; Simmons Co., Southern Division; Dunham-Bush, Inc.; Leff Brothers Dry Goods Co.; Seneca Textile Corp.; Morgan and Lindsey, Inc.; Western Textile Products Co.; Metal Trims, Inc.; Ero, Inc.; Capitol Bolt and Screw Co.; Olinkraft, Inc.; Jantzen Southern, Inc.; S. Klein (Division of McCrory Corp.); Monroe Wholesale Drug Co.; Ethyl Corp.; Hanna Barber & Beauty Supply Co.; Stayon Products, Inc.; American Greetings Corp.; Canteen Corp.; Campus Sweater and Sportswear Co.; Walgreen Co.; M. Lowenstein & Sons, Inc.; McNeil Laboratories, Inc.; Congoleum Nairn, Inc.; Her Majesty Underwear Co.; Avco-Bay State Abrasive

an Appellant, appeal from an Order and Judgment, dated September 11, 1973, and an Order and Opinion, dated October 4, 1973, of the Three-Judge District Court sitting in the United States District Court for the Western District of Arkansas–Fort Smith Division, 364 F. Supp. 1239. These orders reversed a decision of Division 1 of the Interstate Commerce Commission (Commission), which granted certificates of public convenience and necessity to Johnson, Red Ball Motor Freight, Inc. (Red Ball), and Bowman Transportation, Inc. (Bowman).

The Court has jurisdiction of this appeal. Substantial and novel questions requiring this Court's exercise of its "general power to supervise the administration of justice in the federal courts" are presented with respect to Three-Judge District Courts and warrant the filing of briefs and oral argument in this case. *United States v. National City Lines, Inc.*, 334 U.S. 573, 589; *accord, Western Pacific R.R. Corp. v. Western Pacific R.R.*, 345 U.S. 247, 260.

Products Co.; Tupperwear Co.; Lois Hand, Inc.; Carol Wire & Cable Corp.; Foxboro Co.; Dapol Plastics, Inc. and Worcester Toy Co., Inc.; Berkshire Hathaway, Inc.; Pennsylvania Dutch Co.; Shiny Brite Div. of Poloron Co. (formerly Max Eckardt & Sons, Inc.); Magla Products, Inc.; KSM Division of Omark Industries, Inc.; Warner-Chilcott Laboratories (Division of Warner-Lambert Co.); Monroe International, Inc. (Division of Litton Industries); Becton, Dickinson & Co.; American Cyanamid Co.; and Mississippi Bedding Co.

OPINIONS BELOW

The Orders, Judgment, and Opinion of the Three-Judge District Court are reported at 364 F. Supp. 1239 and also are contained in Appellants' Joint Appendix (J.A. J and N). The Report of Division 1, acting for the Commission, is reported at 114 M.C.C. 571 (J.A. B).

JURISDICTION

Appellees' complaint sought to annul, set aside, and enjoin the Commission's Order entered December 30, 1971, *Herrin Transportation Company Extension–Atlanta, Georgia*, No. MC-1124 (Sub-No. 206), 114 M.C.C. 571 (J.A. B). The suit was brought under 28 U.S.C. §§1336, 2284, 2321-2325; 49 U.S.C. §§305(g) and (h); and 5 U.S.C. §706. The Orders of the Three-Judge District Court were entered September 11 and October 4, 1973. 364 F. Supp. 1239 (J.A. J and N). Notice of appeal was filed by Shippers November 5, 1973 (J.A. P). This Court has jurisdiction to review the decision below on direct appeal under 28 U.S.C. §§1253, 2101. *American Trucking Ass'ns, Inc. v. United States*, 364 U.S. 1, 5.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §1 note; 49 U.S.C. §§17(4) and (5), 307(a) and (b); 5 U.S.C. §§556, 557, and 706; and 28 U.S.C. §2284(1) and (5) are set forth in J.A. A.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether a Three-Judge District Court constituted

under 28 U.S.C. §2284, in reversing the expert decision of the Interstate Commerce Commission, abdicated its judicial function by mechanically adopting verbatim the proposed findings and conclusions of one set of parties even when many of those proposed findings and conclusions contain egregious errors of fact and law.

2. Whether the Three-Judge District Court improperly adopted a novel and unwarranted concept of *de novo* review of Commission decisions and changed the statutory relationship between hearing examiners and their agency with respect to recommended and final decisions.

STATEMENT

This appeal seeks reversal of two Orders under which the Three-Judge District Court set aside the Commission's grant of three certificates of public convenience and necessity. The Court mechanically adopted verbatim proposed findings and conclusions of Appellees, who were Plaintiffs in the action before that Court. In the administrative proceeding, Appellees unsuccessfully opposed the Commission grant of these certificates to three Appellants after an administrative proceeding of over seven and a half years, nearly 24,000 pages of testimony, and approximately 2,000 exhibits. The Court also denied a Commission motion to remand the case to the agency.

Reversal is sought on the grounds that, in an administrative proceeding which peculiarly called for the exercise of an expert opinion by the agency statutorily charged with that responsibility, the Court failed to exercise its judicial function of limited review under well established Supreme Court precedent. Instead, without that appearance and form of impartiality which the judicial process requires, the Court mechanically adopted

verbatim the proposed findings and conclusions of Appellees. Thereby, the Court failed to review the record upon which the agency acted, adopted a novel rule of *de novo* review by a Three-Judge District Court, refused to be bound by the substantial evidence rule embodied in the Administrative Procedure Act, and erroneously construed the relationship of hearing examiners and the agency involved. Such abdication of the judicial function by a Three-Judge District Court imperatively calls for the exercise of this Court's responsibility for the proper administration of justice by inferior Federal Courts.

Commenced on December 7, 1964, the administrative proceeding involved applications initially by twenty motor carriers. All sought to conduct general commodities operations between points in the Southwest and Southeast. Ten of these applications were consolidated in one proceeding, in which the administrative record in this case was made. Hearings were held between March, 1966 and August, 1967. Nine hundred and fifty witnesses, including Shippers, testified on behalf of the ten applicants. Sixty protestants opposed the applications. The record was "perhaps the most extensive . . . ever developed in connection with a single group of motor carrier application proceedings before [the] . . . Commission." 114 M.C.C. at 573 (J.A. B, p. 103).

Two hearing examiners on November 19, 1969, issued a recommended report and order (Report). Although finding each of the applicants "capable of performing the operations proposed" (Report, p. 3), every application was denied (*Id.*, p. 32).

Exceptions were filed by eight applicants, including Red Ball, Bowman, and Johnson. Shippers, who were permitted leave to intervene by the Commission, also filed exceptions.

The hearing examiners, in rejecting every application, used an atomized treatment of the evidence, with specific findings of fact for about 45 separate commodities. In its final decision, the Commission, by Division 1,[2] rejected a commodity-by-commodity analysis of the evidence and the examiners' approach that "either all [applications] must be granted or all must be denied." 114 M.C.C. at 574 (J.A. B, p. 104). Instead, the Commission found that "a clearer picture of the supporting witnesses' needs in these proceedings, in view of their magnitude and complexity, can be presented by the grouping of the supporting evidence on a geographic basis." 114 M.C.C. at 591 (J.A. B, p. 121).[3] These "supporting witnesses" included Shippers.

The Commission found that "[t]he evidence considered in its entirety is convincing that the additional services [proposed by Red Ball, Bowman and Johnson] ... will serve a useful purpose, responsive to a public demand and need." 114 M.C.C. at 599 (J.A. B, p. 129). According to the Commission, "supporting witnesses have shown a valid public need for additional motor carrier service [by three applicants]" in view of existing "carrier restrictions or embargoes," "outright refusals by existing carriers to handle their traffic," "pickup and delivery problems," "interline difficulties relating to loss, damage, tracing, shortages, and misrouting," and "lost business and accounts". 114 M.C.C. at 600 (J.A. B, p. 130).

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[2] See 49 U.S.C. §17(1).

[3] The "supporting evidence" accordingly was restated by the Commission in Appendix E to its decision, 114 M.C.C. at 636-756 (J.A. B, pp. 182-318), supplanting Appendix C to the hearing examiners' report.

Petitions for reconsideration and other pleadings were filed by protestants and unsuccessful applicants. By order dated September 6, 1972, the Commission, by Division 1, acting as an Appellate Division, denied or rejected all the petitions relevant to this case. Petitions seeking a declaration by the Commission that the proceeding involved an issue of General Transportation Importance were denied by Order dated October 6, 1972.

The complaint was filed on October 4, 1972, by sixteen Plaintiffs, later joined by three other intervening Plaintiffs. After oral argument on November 1, 1972 (J.A. D), on November 7, 1972, the presiding Senior District Judge entered a temporary restraining order against the Commission decision. *Arkansas-Best Freight System, Inc. v. United States*, 350 F. Supp. 539. Without any substantiation therefor in the body of its opinion, the Court found that "[t]he plaintiffs have established that they are likely to prevail on the merits." 350 F. Supp. at 545. The other two members of the panel did not hear oral argument or participate in this decision.

Upon Appellees' motion filed June 25, 1973, the Court on June 26, 1973, granted them until July 16, 1973, to reply to the Appellants' briefs theretofore filed with the Court. On June 29, 1973, Appellees filed a supplemental complaint, seeking to add Jones Truck Lines, Inc. as an additional defendant and to have reviewed a Commission decision with respect thereto, 117 M.C.C. 586 (Dec. 6, 1972). This matter was argued before the three members of the Court on July 24, 1973 (J.A. E).

During argument on the proposed supplemental complaint, the Senior District Judge stated that

> "... [W]e [the entire Court] feel like the case has been thoroughly argued ... in November [1972, J.A. D] where the court [consisting solely of this Judge] heard that motion for a T.R.O...." (Tr. 113) (J.A. E, p. 567).

Another member of the panel rejected "the big session [on the merits] a couple of weeks from now that I have heard so much about . . . . I will tell you right now, there is no such thing . . . going to occur." (Tr. 4) (J.A. E, p. 458). After Appellants then agreed to forego a full-dress hearing on the merits (Tr. 113-114) (J.A. E, pp. 567-568), the Senior District Judge commented that, with respect to the filing of briefs and a disposition of the case on the merits, "there has always got to be window-dressing" (Tr. 128) (J.A. E, p. 582).

Appellees jointly, the Commission, Bowman, and Johnson, Red Ball, and Shippers jointly, submitted proposed findings of fact and conclusions of law by August 16, 1973 (J.A. F, G, H, and I). Twenty-six days later the Court filed its decision (J.A. J), copying in almost its entirety Appellees' submission (J.A. I).[4] The decision contained no specific references to the agency record but solely to portions of Appellees' proposed findings.[5] The Court acknowledged its "duty to review the whole record" (J.A. J, p. 775; 364 F. Supp. at 1258). Nowhere does the Court state that it reviewed or even took cognizance of the entire record,[6] which remained

[4] Introductory remarks at pages 1-7 of the decision (J.A. J, pp. 742-748; 364 F. Supp. at 1242-1245) contain some departures from Appellees' proposed findings (J.A. I, pp. 697-702). The Court's substantive findings and conclusions (J.A. J, pp. 748-788; 364 F. Supp. at 1245-1264) are adopted verbatim from Appellees' text (J.A. I, pp. 703-738).

[5] *E.g.*, J.A. J, pp. 767, 769; 364 F. Supp. at 1254, 1255.

[6] "Extensive and thorough briefs have been submitted to the court . . . and proposed findings of fact and conclusions of law . . . received, which the court has studied, along with a great many of the exhibits and the Report of the Examiners and the Division 1 Report." (J.A. J, p. 748; 364 F. Supp. at 1245). "After full consideration of the contentions of all the parties, the pertinent portions of the entire record and the proposed findings of fact and conclusions of law submitted by the parties, the court is convinced that the proposed findings and conclusions submitted and requested by plaintiffs are correct, and they are adopted by the Court [in *toto*] as hereinafter set forth." (*Id.*).

unopened in the boxes in which it was shipped to the Clerk of the Court.[7]

The Court, in effect, adopted the findings and conclusions of the hearing examiners, based upon a denial of ten applications. It held that these findings and conclusions with respect to ten applications did not support the Commission's grant of certificates to only three applicants. The Court refused to remand the case to the Commission for the reason that "because the findings and conclusions of the Division are arbitrary, capricious and without rational basis, no useful purpose would be served" thereby (J.A. J, pp. 787-788; 364 F. Supp. at 1264).

The Commission on September 17, 1973, moved the Court to amend its judgment by remanding the case to the Commission for further proceedings consistent with the judgment (J.A. K). The Court denied the motion on October 4, 1973 (J.A. N; 364 F. Supp. at 1266-1272).

THE QUESTIONS OF JUDICIAL ADMINISTRATION AND APPELLATE REVIEW HERE PRESENTED ARE SUBSTANTIAL.

This appeal presents substantial questions affecting the judicial review of Commission decisions and the statutory relationship between a hearing examiner and the administrative agency in which he serves.

The Three-Judge Court paid lip service to precedent established by this Court. It then proceeded to apply a broad and novel scope of review to the Commission's decision. By this process, the Court substituted its own

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[7]See Jones Affidavit, November 16, 1973, App. A, Bowman Jurisdictional Statement.

judgment and that of the hearing examiners for the expert opinion of the Commission, charged by statute with final administrative authority in the motor carrier field.

This result was dictated by the Court's mechanical and verbatim adoption of Appellees' proposed findings and conclusions. The Court's decision, whether or not intended, is not the product of disinterested judicial minds which is the necessary hallmark of Court review. Indeed, the Court condemned its procedure by its own words. An appellate Court " 'must review the record without a rubber stamp approach' " (J.A. J, p. 785; 364 F. Supp. at 1263). Its decision "sounds more in advocacy than in impartial adjudication" (J.A. J, p. 787; 364 F. Supp. at 1264).

The issue of the verbatim adoption, by a Three-Judge District Court, of proposed findings and conclusions of one party never has been presented squarely for decision by the Supreme Court. This Court's exercise of its supervisory authority over the Federal judicial system now is required in order that procedure before Three-Judge District Courts reviewing I.C.C. decisions may be clarified and fixed without question.

A. Verbatim Adoption of Appellees' Findings and Conclusions

The key to the errors committed by the Three-Judge District Court is its mechanical and verbatim adoption of Appellees' proposed findings and conclusions. 28 U.S.C. §2325, the descendant of the Urgent Deficiencies Act, provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part of any order of the Interstate Commerce Commission shall not be granted unless

> the application therefor is *heard and determined by a district court of three judges* under section 2284 of this title." (emphasis added).

Assuming, *arguendo*, all three Judges "fully perform[ed] the judicial function" required by that statute at the oral argument held July 24, 1973, *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 138, they did not "determine" the issues involved when they rubber-stamped Appellees' filings. The guidelines laid down by this Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, were not followed:

> "* * * Those [District Court] findings, though not the product of the workings of the district judge's mind, are formally his. . . . Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court. * * * Moreover, these detailed findings were 'mechanically adopted' . . . and do not reveal the discerning line for decision of the basic issue in the case. * * *" 376 U.S. at 656-657.

Here, the District Court did not even "pick and choose and temper and select those portions [of findings and conclusions proposed by all parties] which better fit its own concept of the case." *Bradley v. Maryland Casualty Co.* 382 F.2d 415, 423-424 (8th Cir. 1967). Indeed, the review provided in this case hardly comports with the kind of review envisioned by Congress under 28 U.S.C. §2325.[8]

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[8] The procedure followed by the Court below has been condemned by the other Circuits. The continuation of Three-Judge District Court review of Commission decisions also has been questioned. Burger, C.J., *Report on the Federal Judicial Branch*, 94 S.Ct. 3, 5 (1973); Staff of Senate Comm. on the Judiciary, 93d Cong., 1st Sess., Judicial Review of Decisions of the Interstate Commerce Commission 2-3 (Comm. Print 1973) ("The Burden of Three-Judge Courts"); see *Swift & Co., Inc. v. Wickham*, 382 U.S.

Verbatim adoption of one party's findings and conclusions does not adequately manifest an independent and uncritical exercise of judicial discretion. *In Re Las Colinas, Inc.*, 426 F.2d 1005, 1010 (1st Cir. 1970), *cert. denied*, 405 U.S. 1067; *United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942), *cert. denied*, 316 U.S. 694. The practice does not "guarantee that each word is impartially chosen." *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 738 (5th Cir. 1962); *In Re Las Colinas, Inc., supra.* Uncritical adoption by the Court of the findings and conclusions of the prevailing party fails to indicate the basis of decision, and thereby "flies in the face of the spirit and purpose" of F.R. Civ. P. 52(a). *Roberts v. Ross*, 344 F.2d 747, 751 (3d Cir. 1965); *Featherstone v. Barash*, 345 F.2d 246, 251 (10th Cir. 1965). The fundamental reason for this condemnation is that the functions of an ardent advocate and an impartial judge are essentially inconsistent. *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1340 fn.3 (9th Cir. 1970).

For purposes of review, "maximum doubt" is cast upon findings of fact and conclusions of law which are mechanically and uncritically adopted by the Court below. *In Re Las Colinas, Inc., supra* at 1010. When the proposed findings of fact and conclusions of law, mechanically adopted, constitute all the essential elements of the Court's opinion, the victorious counsel has effectively prepared that opinion. This involves the "failure of the trial judge to perform his judicial function," and mandates reversal. *Chicopee Manufacturing Corp. v. Kendall Co.*, 288 F.2d 719, 724-725 (4th Cir. 1961), *cert. denied*, 368 U.S. 825.

111, 128-129; *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 92-93 (dissent by Frankfurter, J.); *Phillips v. United States*, 312 U.S. 246, 250.

The District Court's mechanical adoption of Appellees' proposed findings resulted in findings which were "clearly erroneous" under F.R. Civ. P. 52(a). More important, by its mechanization of the judicial review process, the Court below departed from established precedent for the limited scope of review of Commission decisions, contrary to the overwhelming weight of authority in other Three-Judge Court decisions. If this Court does not take jurisdiction and set the matter to rights, the decision below will become precedent for a departure from the rule of law in such cases.

B. Failure to Review Record

The District Court's failure to discharge its judicial duties is exemplified by its adoption of erroneous findings of fact proposed by Appellees. These findings obviously were adopted without the Court itself checking the record as a whole. Some more egregious examples of this error follow.

Shippers' Exceptions. The Court found that "shippers' contentions were more political than judicial" (J.A. J, p. 769; 364 F. Supp. at 1255), and the agency "should not have permitted such parties to inject new issues, particularly since the Examiners were given no opportunity to rule upon such issues" (J.A. J, p. 786; 364 F. Supp. at 1263).

The initial exceptions filed by Shippers March 24, 1970, related to the examiners' findings concerning antitrust matters and their rejection of the public's needs for improved and expanded service.[9] Supplementary excep-

[9] See Appendix A attached, the table of contents of those initial exceptions.

tions filed August 20, 1971, updated the initial filing[10] but were never accepted for the record by the Commission. 114 M.C.C. at 577 (J.A.B, p. 107).

That "competition is our fundamental national economic policy," *United States v. Philadelphia National Bank*, 374 U.S. 321, 372, is not a political issue. Exceptions based upon specific findings and conclusions of the examiners hardly involve "new" issues.

Exceptions to Examiners' Report. The Court accepted Appellees' claim that, "applicants [Appellants] had not challenged any specific findings of the Examiners . . ." (J.A. J, p. 758; 364 F. Supp. at 1250). Appellant trucking companies did except to certain of the examiners' findings, as well as to their conclusions.[11] Shippers excepted to major conclusions of the examiners which embodied subordinate findings of fact. For example, the examiners held that the Commission must grant existing carriers an opportunity to remedy deficiencies in service before authorizing proposed service by another carrier

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[10] See Appendix B attached, the table of contents of those proposed exceptions.

[11] *Johnson (Mar. 24, 1970)*: Conclusion and subsidiary findings that its application should be treated as part of 10 applications and not separately (pp. 4-14); conclusion and subsidiary findings that no public need existed for Johnson proposed service (pp. 14-49).

Bowman (Mar. 10, 1970): Conclusion and subsidiary findings in "considering all 10 applications collectively" (pp. 13-17); error in "basing . . . Recommended Report on broad generalities without specific findings as to the basic facts of record" (pp. 18-23).

Red Ball (Mar. 10, 1970): Conclusion and subsidiary findings that "933 public witnesses failed to establish a need for additional carrier service" (pp. 7-13); conclusion and subsidiary findings that "a grant of the Red Ball application will have an adverse affect on existing carrier services" (pp. 13-16); "treating these applications as 'all or nothing at all' " (pp. 16-50).

(J.A. J, pp. 757-758; 364 F. Supp. at 1249-1250). The Court, in effect, affirmed this finding, which is squarely contrary to *United States v. Dixie Highway Express, Inc.*, 389 U.S. 409, 411.

Transit Studies. The Court stated that the Commission "acted *ex mero motu*" in finding that Appellees' transit time studies "were entitled to little weight," thereby "depriving . . . [them] of any opportunity to defend their propriety or correct the alleged deficiencies" (J.A. J, p. 762; 364 F. Supp. at 1252).[12] Had the Court checked the record, it would have found that Appellant Johnson challenged Appellees' studies in its March 24, 1970 exceptions (pp. 25-27) and in its reply dated August 16, 1972, to Appellees' petitions for reconsideration of the Commission's decision. The Commission did not act on its own motion. In addition, the Court criticized the Commission for subjecting the Appellees to a "changed standard with regard to transit time studies, which they were given no opportunity to meet" (J.A. J, p. 769; 364 F. Supp. at 1260). However, the "standard" applied by the Commission had been set about two months prior to the hearings in this proceeding. *Braswell Freight Lines, Inc. Extension-Atlanta*, 100 M.C.C. 482, 493-494 (Jan. 17, 1966). The parties had sufficient opportunity to meet it. Similarly, the Court rebuked the Commission for its alleged failure to consider recently-issued single-line authorities as a part of the total competitive situation (J.A. J, pp. 766-767; 364 F. Supp. at 1253-1254). But the Commission's report expressly discussed those authorities and took them into account in deciding whether, and to what extent, the public convenience and necessity required authorization of still more service (114 M.C.C. at 576; J.A. B, p. 106).

[12]This is the same as Appellees' proposed finding (J.A. I, p. 715).

Inadequate Service. The Court conceded that "[m]ost shippers generally expressed dissatisfaction with inconsistent and excessive transit time" and "expressed other criticisms of existing service, including the pickup and delivery of shipments. It was also shown that certain carriers maintain various types of formal or informal restrictions as to certain types of traffic, while others fail to render consistent service to authorized points. . . ." (J.A. J, p. 750; 364 F. Supp. at 1245-1246). These facts alone established a rational basis for the Commission's finding of inadequate service. The Court, however, chose to ignore the Commission's, and its own, findings and to copy the proposed findings submitted by Appellees (J.A. I, p. 704). Further, the Court held that the Commission erred in failing to find that Appellant trucking companies were guilty of the same deficiencies in service as those found to have been produced by Appellees (J.A. J, p. 780; 364 F. Supp. at 1261).[13] Had the Court reviewed the Commission's decision, instead of copying Appellees' proposed finding, it would have found that (1) specific complaints against Johnson were *de minimis*, involving nine criticisms by shippers in Georgia and Louisiana;[14] and (2) findings by the examiners themselves supported the Commission's conclusions as to existing inadequate service.[15]

C. Novel Concept of De Novo Judicial Review.

Plaintiffs' proposed findings stated, and the District Court ruled, that, despite the substantial evidence rule

[13]This is Appellees' proposed finding (J.A. I, p. 730).

[14]Exhibits to Brief of Lorch-Westway Corporation, *et al.*, May 1, 1973 (pp. 190-191), Doc. No. 4, Index to Briefs, Certificate of District Court Clerk dated Nov. 15, 1973, transmitted to this Court the same date. See 114 M.C.C. at 660 (J.A. B, p. 206).

[15]*Id.*, pp. 211-421.

and a rational basis for Appellants' contentions, the Commission's decision was arbitrary and capricious under 5 U.S.C. §706. By its conclusion that the Commission's action was "arbitrary and capricious" (J.A. J, p. 775; 364 F. Supp. at 1259), the District Court misread the decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402.[16] This result defies clear precedent of this Court as applied by the Federal Courts.[17] The proper standard of judicial review for an adjudicatory administrative decision is whether that decision is supported by substantial evidence upon the record as a whole. In making such a review, the Court cannot substitute its own view for the Commission's expert judgment when the latter is warranted by support in the record. *Illinois Cent. R.R. v. Norfolk & W. Ry.*, 385 U.S. 57, 66; *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620-621; *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286-287; *United States v. Pierce Auto Freight Lines, Inc.*,

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[16]Apart from the misconstruction of *Overton Park*, the sole authority cited for this proposition is *Columbia Shippers & Receivers Ass'n, Inc. v. United States*, 301 F. Supp. 310, 319 (D. Del. 1969). The decision there on this point was unprecedented and has not since been cited, except for its contrast to established law. *See, Metropolitan Shipping Agents of Ill., Inc. v. United States*, 342 F. Supp. 1266, 1268 (D. N.J. 1972).

[17]*United Trucking Service, Inc. v. United States*, 359 F. Supp. 100, 104 (E.D. Mich. 1973); *Twin City Freight, Inc. v. United States*, 360 F. Supp. 709, 712 (D. Minn. 1972); *Garrett Freightlines, Inc. v. United States*, 353 F. Supp. 1329, 1333 (W.D. Wash. 1973); *James Hughes, Inc. v. United States*, 292 F. Supp. 372, 373 (S.D.N.Y. 1968); *United Van Lines, Inc. v. United States*, 266 F. Supp. 586, 588-589 (E.D. Mo. 1967); *Continental Southern Lines, Inc. v. United States*, 265 F. Supp. 218, 221 (W.D. La. 1967); *Dance Freight Lines, Inc. v. United States*, 149 F. Supp. 367, 373 (E.D. Ky. 1957; *Allied Van Lines Co. v. United States*, 303 F. Supp. 742, 746 (C.D. Cal. 1969).

327 U.S. 515, 536; *ICC v. City of Jersey City*, 322 U.S. 503, 512-513. While the District Court paid lip service to this test in its opinion (J.A. J, pp. 771-772; 364 F. Supp. at 1256-1257), it insisted upon following Appellees' proposal, verbatim, that *Overton Park* mandated looking beyond the "substantial evidence" test to whether there was arbitrary and capricious action or abuse of discretion on the part of the Commission (J.A. J, p. 773; 364 F. Supp. at 1258-1259).

Relying as it did upon Appellees' proposed conclusions of law, the Court disregarded this Court's limitation of the *de novo* review provided in *Overton Park* to situations where the administrative hearing was "nonadjudicatory, quasi-legislative in nature [,] . . . not designed to produce a record that is to be the basis of agency action—the basic requirement for substantial-evidence review." This type of review does not apply "when the agency action is based on a public adjudicatory hearing." 401 U.S. at 414-415.

Here the Three-Judge District Court impermissibly rejected the application of the substantial evidence rule to a hearing on the record. Such judicial error, because of its possible applicability to other cases involving the review of Commission decisions, involves one of those unique situations contemplated in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-491, where jurisdiction should be taken by this Court.

D. Misconception of Relationship Between Agency and Hearing Examiner.

The Three Judge District Court accorded overwhelming weight to the examiners' report, to override the Commission's decision. (J.A. J, p. 756; 364 F. Supp. at 1250). Such a result contradicts 5 U.S.C. §557(b) which

provides that in such circumstances the "agency shall have all the powers which it would have in making the initial decision." See 2 K. Davis, Administrative Law Treatise §10.04 (1958). "The Commission is not bound by the examiner's conclusions. Rather the Commission is free to make its own independent determinations," *Frozen Food Express, Inc. v. United States*, 301 F. Supp. 1322, 1324 (N.D. Tex. 1969); see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493; *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364-365.

While a reviewing Court must look to the examiner's report as part of the whole record, such a report remains only a part of the record. It cannot be used, as here, as a method of negating the Commission's decision. The Court held that the conclusions of the examiners, based upon findings of fact to which specific exceptions allegedly were not taken, were nonreviewable by the Commission and even by the Court. That exceptions were taken to the examiners' conclusions and that the Commission reached different conclusions were disregarded by the Court.

Under this novel theory of law, the role of hearing examiners has been exalted to that of final decision, even where, as here, the agency with statutory responsibility in the motor carrier field reaches contrary conclusions. The result of the Court's action is to defeat the letter and the spirit of the Administrative Procedure Act and the Interstate Commerce Act.

CONCLUSION

Probable jurisdiction should be noted. Abdication of the judicial function and usurpation of the Commission's function require that the Three-Judge District Court decision be reversed, and the decision of the Commission affirmed.

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APPENDIX A

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* * * * *

NO. 73-1071

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

LORCH-WESTWAY CORPORATION, *et al.*,
Appellants,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS–
FORT SMITH DIVISION

BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM

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Appellees' Motion to Dismiss and Affirm (Motion) buttresses Appellants' Jurisdictional Statements and gives added justification to this Court's taking jurisdiction. Appellees' argument shows clearly, as Appellants have demonstrated, that this is not a case where this Court will be required to review the substantiality of the evidence in the record below.

Court's Mechanical Verbatim Adoption of Appellees' Proposed Findings

Appellees' three "examples" of "other comments and quotations not included in Appellees' proposals" (Motion, p. 18, fn. 32) are, in fact, the only changes made by the Three Judge District Court. Except for these three insubstantial alterations, that Court's decision totally mirrors the proposed findings and conclusions of Appellees.[1] The appended table demonstrates this fact.

Appellees attempt to rationalize verbatim adoption as a practice which has recently been countenanced by several Courts of Appeals (Motion, p. 21, fn. 38). All but one of the decisions cited by Appellees involve patent cases which concern highly technical issues requiring expertise not possessed by those Courts. The other decision involves a complex bankruptcy case in which the Court explicitly disapproved the practice of verbatim adoption except where the subject matter is of a highly technical nature. *Flora Mir Candy Corporation v. R.S. Dickson & Co.*, 432 F.2d 1060, 1062, fn. 2 (2d Cir. 1970). Just as this qualification does not apply to antitrust cases, *United States v. El Paso Natural Gas*, 376 U.S. 651, 657, it does not apply to interstate commerce cases. As to ordinary cases, the practice is strongly condemned, especially where the extent of the uncritical adoption is as significant as here. See, *e.g.*, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57; *Industrial Building Materials, Inc. v.*

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[1] Appendix A to the Court's Opinion, "Status of Jones Truck Lines, Inc." (Jt. App. J, pp. 789-794), concerns a matter disposed of by the Court on motion and involves a tangential matter related in no manner whatsoever to the merits of the case. Why the appendix was included is not clear on the face of the document.

Interchemical Corp., 437 F.2d 1336, 1340 (9th Cir. 1971); *In Re Las Colinas, Inc.*, 426 F.2d 1005, 1010 (1st Cir. 1970); *Featherstone v. Barash*, 345 F.2d 246, 249 (10th Cir. 1965); *Roberts v. Ross*, 344 F.2d 747, 752 (3d Cir. 1965); *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 738 (5th Cir. 1962); *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724 (4th Cir. 1961), *cert. denied*, 368 U.S. 825; *United States v. Forness*, 142 F.2d 928, 942 (2d Cir. 1942), *cert. denied*, 316 U.S. 694; see Nordbye, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 25, 30 (1940); Otis, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 83, 85 (1940).

Precedent for Reversal

Appellees contend that the degree of judicial abdication by the Three Judge District Court[2] is defensible because there is no precedent for reversal on this ground. This contention is manifestly erroneous. *In Re Las Colinas, Inc.*, 426 F.2d 1005, 1017 (1st Cir. 1970);

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[2] Appellees attempt to cast this issue as one involving the integrity of the three judges on the panel. (Motion, pp. 13, 21). Appellants do not challenge integrity, only abdication. The danger inherent in relinquishing judicial duties to advocates is well-stated in *Brenger v. Brenger*, 142 Wis. 26, 125 N.W. 109 (1910), quoted in Otis, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 83, 85 (1940):

> "Experience shows that counsel, the most able, honorable and conscientious ... after the close of a hotly contested case, are not in the frame of mind, ordinarily best suited to drafting the findings, which must express the judgement of the court.... The making of the findings is a purely judicial function."

This statement also is quoted in *In Re Las Colinas*, 426 F.2d 1005, 1009 n. 4 (1st Cir. 1970).

Industrial Building Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1345 (9th Cir. 1971); *Featherstone v. Barash*, 345 F.2d 246, 251 (10th Cir. 1965); *Roberts v. Ross*, 344 F.2d 747, 753 (3d Cir. 1965); *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719 724 (4th Cir. 1961), *cert. denied*, 368 U.S. 825. In each of these cases, findings prepared by counsel and adopted by the Court were deemed inadequate to support the judgment, and the judgment was reversed or vacated on appeal.

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APPENDIX A

Appellees' Proposed Findings of Fact (App. I) Para. No.	Page	District Court Opinion (App. J) Page	Comparison
6	699	744	Adopted verbatim
7	699-700	744-45	"
8	700	745	"
9	700-1	745-46	"
10	701	746	"
11	701	746	"
12	701	746	"
13	702	747	"
14	702	747	"
15	702	747	"
16	702-3	748	"
17	703	748-9	"
18	704	749	"
19	704-5	749-50	"
20	705	751	"
21	705-6	751-52	"
22	707	752-53	"
23	707	753	"
24	708-9	753-55	"
25	709	755	"
26	709	755	"
27	709	756	"
28	710	756	"
29	710	756-57	"
30	710	757	"
31	710	757	"
32	710	757-58	"
33	711	758	"
34	711-12	758	"

Appellees' Proposed Findings of Fact (App. I) Para. No.	Page	District Court Opinion (App. J) Page	Comparison
35	712	758-59	adopted verbatim
36	712-13	759	"
37	713	759-60	"
38	713-14	760-61	"
39	714	761	"
40	714-15	761-62	"
41	715-16	762-63	"
42	716-17	763-64	"
43	717	764-65	"
44	717-18	765	"
45	718	765-66	"
46	718-19	766-67	"
47	719-20	767	"
48	720	767-68	"
49	720	768	"
50	720-21	768	"
51	721	769	"
52	721	769	"
53	721	769	"
54	721	769	"
55	721-22	769-70	"
56	722	770-71	"

Appellees' Proposed Conclusions of Law (App. I) Para. No.	Page	District Court Opinion (App. J) Para. No.	Page	Comparison
1	724	1	771	Adopted Verbatim
2	724	2	771-72	"
3	725	3	772-73	"
4	725-26	4	773-74	Quote added from *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156.
5	726	5	774	Adopted Verbatim
6	726-27	6	775	"
7	727	7	775-76	"
8	727	8	776	Quote added from *Universal Camera Corp. v. NLRB*, 340 U.S. 474; added citation to *Bituminous Material & Supply Co. v. NLRB*, 281 F.2d 363 (8th Cir. 1960).
9	727-28	9	776-77	Adopted Verbatim
10	728	10	777	"
11	728	11	777-78	"
12	728-29	12	778	"
13	729	13	778-79	"
14	730	14	779	"
15	730-31	15	779-80	"
16	731	16	780	"
17	731	17	781	"
18	732	18	781	"
19	732	19	781	"
20	732	20	781-82	"

Appellees' Proposed Conclusions of Law (App. I)		District Court Opinion (App. J)		Comparison
Para. No.	Page	Para. No.	Page	
21	732-34	21	782-84	adopted verbatim
22	734	22	784	"
23	734-35	23	784-85	"
24	735	24	785	"
25	735-36	25	785-86	"
26	736	26	786	"
27	736-37	27	786-87	"
28	737	28	787	"
29	738	29	787-88	Ordering clause only changed.